

Case Summary

Appellant-Petitioner Larry Robinson, Jr. (“Robinson”) appeals the denial of his petition for post-conviction relief, which challenged his convictions for two counts of Voluntary Manslaughter, as Class A felonies.¹ We affirm.

Issue

Robinson presents a single issue for review: whether he was denied the effective assistance of trial and appellate counsel because counsel did not challenge perjury admonitions given by the trial court to two of the State’s witnesses.

Facts and Procedural History

The relevant facts were recited on direct appeal as follows:

In the early morning hours of August 11, 1995, Richard Sliezak and Kenneth Lewis drove to Gary, Indiana in their motor home in search of drugs. After their arrival in Gary, Sliezak and Lewis stopped to speak with a group of men which included Robinson. A short time later, shots were fired inside the motor home and Robinson was seen fleeing from the motor home. An eyewitness also testified that she overheard Robinson say that he had killed the two men and asked what he should do with the gun. Both Sliezak and Lewis died from gunshot wounds suffered inside the motor home.

On October 23, 1995, the State filed an information charging Robinson with two counts of murder for the slayings of Sliezak and Lewis. Robinson’s trial on the murder charges began on June 3, 1996. On the first day of the trial, Robinson was informed that Janeth Alexander (“Alexander”), an eyewitness, had finally been located by the State. Robinson then made a motion to continue the trial to allow him time to take Alexander’s deposition. The trial court denied this motion for a continuance.

During the trial, the State called Dennis Cardwell (“Cardwell”) to testify against Robinson. After Cardwell claimed he had no knowledge of the shootings, the State confronted Cardwell with a statement that he had made to

¹ Ind. Code § 35-42-1-3.

Detective Irons (“Irons”) on October 24, 1995. Cardwell initially denied giving a statement, but eventually admitted that he had made a statement and verified that his signature was at the bottom of each page of the statement. Notwithstanding his acknowledgment of the statement, Cardwell testified that he did not identify Robinson as one of the men who shot the two victims. Ultimately, Cardwell claimed that the statement was a fabrication of the police. The State then, over the objection of Robinson, asked Cardwell if he had told Irons that he was a Gangster Disciple. After Cardwell stepped down, the State called Irons to testify. Irons testified that he questioned Cardwell on October 24, 1995, and took his statement concerning the shootings. During this questioning, Cardwell made an oral statement about the shootings which Irons then reduced to writing. When asked whether Cardwell had identified Robinson as one of the “shooters,” Robinson objected on the grounds of hearsay and stated that Irons could not testify to what Cardwell had said when Cardwell had already denied making the statement. The trial court overruled the objection stating that Irons could testify about Cardwell’s identification of Robinson under Indiana Rule of Evidence 801(d)(1)(C). Irons then testified that Cardwell had identified Robinson as one of the shooters.

After testifying that he was the commander of the gang tactical unit, Irons stated that a tattoo bearing the letters GD stood for Gangster Disciple. Near the end of the trial, the State sought to have Robinson display his tattoo bearing the letters GD to the jury. Robinson objected on several grounds. The State argued that this display showed that both Robinson and Cardwell were Gangster Disciples, thus explaining Cardwell’s bias. The trial court agreed with the State and ordered Robinson to show his tattoo to the jury.

After hearing all the evidence, the jury convicted Robinson of two counts of voluntary manslaughter, both as Class A felonies. The trial court sentenced Robinson to an aggregate of thirty-five years on July 2, 1996.

Robinson v. State, 682 N.E.2d 806, 807-08 (Ind. Ct. App. 1997).

On direct appeal, Robinson challenged the denial of his motion for a continuance, the admission of evidence of Robinson’s and Cardwell’s gang membership, and Detective Irons’ testimony that Cardwell previously identified Robinson as one of the men who shot the victims. This Court affirmed Robinson’s convictions. Id. at 811.

On July 26, 2006, Robinson filed a petition for post-conviction relief, which was amended on January 22, 2007. An evidentiary hearing was conducted on March 12 and June 1, 2007. On December 14, 2007, the post-conviction court entered its Findings of Fact, Conclusions of Law, and Judgment denying Robinson post-conviction relief. Robinson now appeals.

Discussion and Decision

Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

Robinson contends he was denied the effective assistance of both trial and appellate counsel. Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective

assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” Id.

Moreover, under the Strickland test, counsel’s performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

Robinson alleges that his trial counsel was ineffective for failing to object when the trial court admonished two witnesses regarding the penalties for perjury. First, Robinson observes that the witnesses were erroneously informed that perjury is a Class C felony as opposed to a Class D felony.² Second, Robinson claims that the admonishments intimidated

² Ind. Code § 35-44-2-1.

the witnesses to tailor their testimony to conform to prior statements, thereby depriving him of due process of law. Robinson rests his due process argument upon Webb v. Texas, 409 U.S. 95 (1972).

Webb involved a burglary defendant who elected to present a sole defense witness. See id. When the defense witness was called to testify, the trial court, acting on its own initiative, admonished the witness as follows:

Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The Court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking.

Id. at 95-96 (emphasis added). After receiving the lengthy warning, the witness declined to testify for any purpose and was excused by the court. Id. at 96. Webb was convicted and his conviction was upheld on appeal. The Supreme Court granted Webb's petition for a writ of certiorari, found that "the trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury" and then "implied that he expected [the witness] to lie" and assured prosecution and probable conviction. Id. at 97. The Supreme Court held "the judge's threatening remarks, directed only at the single witness for the defense,

effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment.” Id. at 97-98.

The circumstances here are unlike those present in Webb. The trial court gave brief and impartial admonitions to Alexander and Cardwell. Far from being “driven off the stand,” Alexander and Cardwell continued to testify and to do so in the same vein as before the advisements.

Ultimately, both Alexander and Cardwell testified in terms less incriminating to Robinson than those of their prior statements to police. Despite the perjury admonition, Cardwell testified that he was not present at the shootings and that his prior statement was a police fabrication. Alexander maintained, before and after the perjury admonition to her, that some parts of her police statement were inaccurate. She testified that she could not see the individuals inside the victims’ motor home with sufficient clarity to identify them, that she did not see anyone enter or exit the motor home, and that she could not actually tell whether or not the object in Robinson’s hand was a gun.³

Although technically incorrect regarding the class of felony involved, the trial court’s admonitions did not have the effect of depriving Robinson of testimony favorable to him and he was not denied due process. As the events here are clearly distinguishable from those in Webb, the trial court would not have been obliged to sustain trial counsel’s objection alleging

³ The most incriminating portion of Alexander’s testimony – that she heard Robinson admit to killing the victims – was not impacted by the trial court’s admonition. Alexander testified prior to the admonition that she heard Robinson confess to the killing. This testimony is consistent with her police statement, and she did not at any time repudiate that portion of the statement.

a due process deprivation. Robinson's claim of ineffectiveness of trial counsel on this basis must fail.

Robinson also claims his appellate counsel was ineffective for failing to raise a due process issue citing Webb. Appellate courts should be particularly deferential to an appellate counsel's strategic decision to include or exclude issues, unless the decision was "unquestionably unreasonable." Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997). To prevail on his claim of ineffective assistance of appellate counsel, Robinson must show that counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens, 770 N.E.2d at 760. We have concluded that the perjury admonitions at issue did not deprive Robinson of due process. As such, appellate counsel did not overlook a significant and obvious issue. Robinson has not established ineffectiveness of appellate counsel.

Conclusion

Robinson failed to demonstrate that he was prejudiced by perjury admonitions to witnesses. As such, he did not establish the ineffectiveness of either trial counsel or appellate counsel for failure to challenge the same. The post-conviction court properly denied Robinson post-conviction relief.

Affirmed.

RILEY, J., and BRADFORD, J., concur.